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INTROSPECTING THE ORDER NO. (55) OF 2020 REGARDING CONSIDERING THE CORONA VIRUS AS A FORCE MAJEURE

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ABSTRACT:
After the Corona pandemic swept the world, starting with China, the curfews that the world witnessed, and the stopping of import and export operations between different countries of the world, which had a negative impact on the contracts and agreements signed, whether between individuals, companies, or countries, the legal views differed about whether the Corona pandemic is a force majeure or an emergency circumstance.

Keywords: Contracts, corona, emergency, force majeure.

INTRODUCTION

First; defining the research topic.

The Corona epidemic swept the planet of the Earth. Its beginning is in China. It has had an impact on contracts and agreements concluded and signed between individuals, companies, and countries. Its effects have changed the aspects of dealings between the parties. Health epidemics are a pure material occurrence, whose clear negative effects, the features of which can be monitored on legal relations in general and contractual relations in particular. These obligations are broken as a result of stagnation or paralysis affecting the movement of individuals and funds, which makes it impossible or, at least, difficult to implement some obligations or delay their implementation. In response to this, states issued decisions regarding this pandemic and its impact on contracts, Including France and Iraq.

Second : Problem of the Study

The study problem revolves around the extent to which the Corona pandemic is considered a force majeure, and the extent to which this description fits into the general rules contained in the Iraqi amended Civil Law No. (40) of 1951, concerning the emergency and force majeure.

Third: Methodology of the Study

The two researchers adopt the descriptive analytical approach to introspect the Order No. 55 of 2020 regarding considering the Corona virus as a force majeure by reviewing and analyzing texts. They also use the comparative approach between Iraqi law and French law.

Fourth: Plan of the Study

The present study is divided into two sections. Section one is devoted to the scope of the Order regarding the Corona pandemic as a Force Majeure. Section two is devoted to explaining how to adapt to the Corona epidemic. acknowledgements to Al-Mustaqbal University College for Financial support and verify your research in Scopus journals Development and Scientific Knowledge.

Section One

The scope of the order regarding the Corona pandemic as a force majeure.

The Corona virus crisis has cast a shadow at psychological, social, political, and legal levels. On the legal level, many problems have arisen after the declaration of the state of emergency and the comprehensive ban. Among those problems is the effect of the Corona virus on contractual obligations. The Crisis Unit is an administrative order that includes a number of decisions, including its decision in paragraph (12) of the Order No. (55) for 2020 considering the Corona virus as a force majeure, starting from 2/20/2020 until the end of the Corona virus crisis.

In order to clarify the scope of the court order, this section is divided into two subsections. In the first subsection, contracts of a national character are dealt with. In the second subsection, contracts of an international character are dealt with.

First : Contracts of a national character

Contracts are considered important legal acts on the practical level. They are intended in general terms that two identical wills agree on events to create, transfer, amend, or terminate an obligation[1].

The contract is national when it is subject to all its details to the national rules, and is governed by the commanding texts that do not allow the contracting parties to violate them. The issue of conflict of laws is not raised because it is governed by one law, which is the law of the country to which it belongs with all its elements[2].

[1] Al-Bakri, A. And Al-Basheer, Z. (2012) The entrance to studying Law, 1st edition, Alsanhoori library, Baghdad, p. 247.

[2] Hashim, M. (2003) International contracts between traditional and modern theory, Journal of Shareeaa and Law, No, 20, p. 259.

The contracts of a national character vary according to the nature of their subject matter, including civil, commercial, and administrative contracts. These contracts are divided, in terms of the time component of implementation, into continuous implementation and immediate implementation contracts.Continuous implementation contracts are defined as contracts in which time is an essential element, for example the lease or supply contract. Continuous contracts are either to be of continuous implementation or to be of periodic implementation. An example of timely Continuous implementation contracts is the lease contract because the use of the thing is not conceivable except for an extended period of time, and the rent is calculated on the basis of the period. It is one of the continuous contracts, because the benefit is achieved gradually. The supply contract, such as supplying hospitals with food, is a periodical contract[3]. It must be said that the fact that the contract continues to be implemented means that its subject matter is the civil law or the commercial law. They differ only in terms of the subject matter of each of them and their logical law. Commercial contracts are held between two antities, each of which is a merchant, according to the provisions of the commercial law. As for civil contracts, they are related to civil work and are subject to the provisions of the civil law[4].

As for the immediate contract, it is the contract in which time is not considered an essential element, and which responds to a performance that can be implemented immediately. For example, the sale contract in which the seller commits to transfer the ownership of something to the buyer remains immediate even if the thing sold is something In the future, such as selling the fruits of an orchard that has not yet ripened, because the element of time does not play a fundamental role in the contract and does not particularly affect the sale price[5].

Accordingly, the scope of the Crisis Unit's decision is specific to continuous implementation contracts, in which time is an essential element since immediate contracts are implemented, unless the implementation is postponed, because the effects of crises and emergency accidents cannot be visualized unless they are ongoing.As for the time of the contract, the contracts that fall within the scope of this decision are the contracts concluded before the announcement of the Corona virus as a force majeure, and are still continuing to be implemented. Paragraph (12) of the Order stipulates that the period of the Corona virus crisis is considered a Force majeure ... from 20 / February / 2020 until the Ministry of Health announces the end of the Corona epidemic[6]. It is also not noted from the administrative order that it includes all types of contracts, whether those contracts are commercial, civil, or administrative.A number of contracts, namely, immediate implementation contracts, contracts whose implementation period ended before 20/2/2020, even if the debtor did

[3] Al-Hakeem, A. (1974) Al-Mujaz fi sharh al-qanoon; Sources of obligation, Al-Aani press, part 1, Baghdad, p. 28.
[4] Al-Baroodi, A. (1975) Commercial Law, Al-Maarif foundation, Alexandria, p. 211.
[5] Al-Hakeem, A. previous source, p. 28.
6The order no. (55) for 2020, available at: https://iraqi24.com، visited on the 24th-5-2020 at 10:12 pm.

not fulfill his/her obligations, contracts whose implementation period ended before 20/2/2020, in which the debtor does not fulfill his/her commitments, and contracts concluded after the 20/2/2020 as the two contractors are aware of the pandemic, which means that they are ready to bear losses, are out of the scope of this order.

Second: Contracts of an international character

Contracts of an international character are contracts that include a foreign element. A contract is considered international if its legal elements are linked to more than one legal system. These elements are either the place of concluding or implementation of the contract or the nationality of the contractors or their domicile. Accordingly, the internationalization of the contract depends on The extent to which the foreign feature addresses its various legal elements[7].

The state is a party in these contracts. They are governmental contracts. They are defined as contracts concluded between the state, or an entity subordinate to the state, and a foreign citizen or legal person with a foreign nationality. Governmental contracts can cover a wide range of contracts[8]. These contracts are based on considerations related to public policy, whether in relation to foreign direct investment projects or other state-sponsored economic functions. Often, an element of the general law rule or the government's discretionary authority enters into the negotiation concerning these contracts and their conclusion and implementation[9].

The contracts of an international nature are between persons of private law. These contracts take different types according to the nature of the legal relationship that it contains, including those related to personal status. This range of contracts is excluded from the scope of the decision due to the privacy of those contracts and which does not include the implementation of an obligation as is the case in the other contracts. There is no effect of force majeure or emergency circumstances on those contracts. Some of such contracts are within the framework of international trade. These contracts take different forms[10]. International trade contracts[11] are distinguished as contracts of an immediate, executive nature, that is, continuous implementation, characterized by their duration. This is due either to the agreement of the parties and their desire to achieve a measure of stability in their transactions, as in concession contracts and supply contracts, or to the nature of

[7] Al-Haj, I. (2013) The compulsory Law in contracts of global trade in light of commercial globalization, Journal of legal and political research, No. 1, p. 191.

[8] Among such contracts are contracts of importing commodities, services, usage, and large infrastructures projects, such as constructing roads, harbors, and dams. Among the most common governmental contracts is the contract of exploiting natural resources, which is termed as the excellence contract. The other contracts are the contracts of foreign investment and lending agreements.

[9] Sovant, C. and Zan, J. (2004) Governmental contracts, Oniktad series of studies about global investment issues, 1st edition, The United Nations' publications, Switzerland, p. 3.

[10] Musa, T. (2008) The International Trade Law, 1st edition, Culture House, Beirut, pp. 34- 41.

[11] Import contracts, industrial license contracts, project products distribution contracts, and technology transformation contracts.

international trade contracts themselves, in addition to the enormity of the work required to be executed[12], which requires a long time in order for the parties to implement their obligations. For example, technology transformation contracts, contracts for the construction of ready-made factories and international roads, and contracts for the extraction of oil refining. Since these contracts are for a long period, which may be years, they are vulnerable to being affected by changing circumstances surrounding them[13]. As these changes have a prominent impact on the domestic scale, then, this effect will increase on the international scale. The global market movement often witnesses a noticeable change in the prices of manufactured or produced raw materials due to some events and circumstances, such as wars and epidemics. A change in the circumstances surrounding the contract affects the implementation of the contractors' obligations making implementation either impossible or cumbersome[14].

Section two

Adapting to the Corona Pandemic

Contracts are based on the rule of the contract and the judiciary of the contractors[15]. which requires respect for the content of the contract, whether by the contracting parties or by the judiciary. However, epidemics as a material occurrence have clear negative effects, the effect of which appears on legal relations in general and contractual relations in particular, as they make It impossible, or, at least, difficult to fulfill or delays in fulfillment of some obligations.Accordingly, throughout the world, legal thought and judicial jurisprudence have adopted two mechanisms that are considered to be protective measures for the debtor, namely the theories of force majeure and emergency circumstances, which aim to treat cases in which the contractual obligation becomes impossible to implement or the implementation becomes cumbersome.Based on that, is the Corona pandemic a force majeure, or is it an emergency condition. This section is divided into two subsections. In the first subsection, force majeure is tackled. In the second subsection, the theory of emergency conditions is investigated.

First: The force majeure

The Iraqi amended Civil Law No. (40) of 1951 did not provide a definition of force majeure. There is no doubt that this is considered a commendable act,

[12] Ghannam, S. (2010) The impact of changing commercial conditions on International Trade Contracts, 1st edition, Al-Fajr national press, Dubai, p. 5.

[13] Abdulkareem, M. (2018) The impact of changing commercial conditions on the stability of International Trade Contracts, Journal of rights and political sciences, University of Abbas Lagroor Khanshal, No. 10, Algeria, p. 403.

[14] Ashoor, F. (2018) Treating the impact of changing conditions on implementing International Trade Contracts, Journal of Dafatir for scientific research, Vol. 1, No. 1, Algeria, p. 55.

[15] Getting back to the essence of this rule, it is clear that it is based on the principle of the authority of the willingness, Al-Hakeem, A. previous source. It is also based on an ethical basis respecting covenants and agreements as well as on an economic basis interpreted by the must of stability of transactions, Sawar, W. (1979) Expressing willingness in the Islamic judiciary: A comparative study with the western judiciary, 2nd edition, National company for publishing and distribution, Algeria, p. 597.

because the law is not tasked with setting a definition of concepts. Jurisprudence[16] defines it as an unexpected event that makes the implementation of Obligation absolutely impossible, not only for the debtor, but also for everyone who is in the debtor's position.

In the Iraqi civil law, force majeure is classified within the external cause, the which is either a force majeure or a sudden accident. There are several applications of force majeure in the civil law, including Article (179) which stipulates that if the contracted thing perishes, whether by act or force majeure, while it is still with the owner, the contract is terminated... Article (211) stipulates that if the person proves that the damage has arisen from an external cause, such as a celestial scourge, a sudden accident, or a force majeure....,
he/she is not bound by the guarantee unless there is a stipulation or an agreement. Article (425) of the Civil Code stipulates that the obligation shall lapse if the debtor proves that fulfilling it has become impossible for an external cause. It is noticed that the effect of the force majeure is an effect with dangerous consequences that lead to the demolition of the contract[17]. As a result of its occurrence, force majeure entails the principle of the impossibility of implementation. It must be said that this principle is characterized by its strictness and severity of the legal implications, most notably the termination of the contract automatically with the force of law due to the impossibility of its implementation and the expiration of the obligations arising from it, and the exempting the indebted. Exempting the indebted from fulfilling contractual obligations, which constitutes the destruction of the entire contract. In addition, the risk of non-implementation of contractual obligations is transferred to the creditor after exempting the indebted from its implementation.In order to reduce the severity of the effects that the principle of the impossibility of implementation entails due to force majeure, most countries have embarked[18] to put in place mechanisms that moderate this principle in line with the development in legal life. The French amended Civil Code of 2016 reduced the severity of the principle of impossibility of implementation Because of force majeure. Article (2/1218) stipulates that the force majeure event justifies suspending the contract if the force majeure event is temporary or terminating the contract if the force majeure event is permanent[19], unless agreed to bear the risks of the event or previously notified

[16] Al-Sanhoori, A. () Al-Wasseet fi sharh alqanoon almadani, part 1, Sources of obligation, 3rd edition, House of Arab heritage revival, Beirut, pp. 736- 737.

[17] Musa, T. (2008) International Trade Law, 1st edition, Culture House for publishing, Amman, p. 212.

[18] The English Law stipulated the condition of force majeure in accordance with the public English Law that it is a contractual provision that is characterized by a large scale of flexibility aiming at reducing the impossibility of implementing the contractual obligations to avoid terminating the contract. The parties stipulate many means to maintain the continuity of the contract, such as stipulating suspending the contract during force majeure, suspending fulfilling obligations until the force majeure disappears, or expanding the duration for fulfilling the obligations, McKendrick, E. (1995) Force Majeure and Contract Frustration, 2nd edition, University of Oxford, UK, p. 122.

19 The French Civil Law amended due to the order no. 2016/131 in 10/2/2016, available at: www.legifrance.gouv. Visited on the 6/5/2020 at 5:02 pm.

of performance[20]. Three conditions must be met in order for the event to be considered as a force majeure event: The event must be outside the indebted control, it could not have been reasonably anticipated at the time the contract was concluded, and its effects cannot be avoided by appropriate measures[21]. The jurisprudence believes that the main purpose is to protect and preserve the contract, especially contracts of an international character and contracts of a national character that are continuing to be implemented, in which there is a time lag between the stage of its conclusion and the stage of its implementation[22].

On February 28, 2020, the French judiciary recognized that the corona virus is considered a force majeure, and the judge must consider the extent to which this epidemic is considered a temporary or non-temporary obstacle, taking into account the geographical area and the circumstances surrounding the contract, and the date and place of the contract conclusion, and related governmental measures[23].

Accordingly, the Iraqi legislator should reduce the principle of the impossibility of implementation that results from the occurrence of force majeure, as the circumstances surrounding the conclusion of the contract must be considered separately for each contract, in addition to the different contracts, the extent of their magnitude, the legal positions of the parties to the contract, and the different nature and scope of contracts.If this is the concept of force majeure according to the provisions of the Iraqi civil law and its legal effects, is it possible to apply it to the Corona virus and consider it as a force majeure, which results in the termination of the contract, and the dissolution of obligations in accordance with the administrative order, and the decision of the Federal Court of Cassation considering the spread of the Corona pandemic as a force majeure[24]?

The World Health Organization announced that Corona virus has been classified as a global pandemic. It can now be classified as a pandemic... The spread of a pandemic due to the Corona virus has not been observed[25]. If Corona virus is a pandemic, according to what the World Health Organization declared, the description of force majeure is negative, so it does not apply to it, because the term pandemic is used by Muslim jurists to express emergency conditions. Thus, it is synonymous with the theory of emergency conditions

[20] Article 1351/1 of the French Civil Law.

[21] Article 1218 of the French Civil Law.

[22] RochfelaireIbara, L'aménagement de la force majeure dans le contrat : essai de théoriegénéralesur les clauses de force majeure dans les contrats internes et internationaux de longue durée, These Pour l'obtention du grade de, UFR de droit et sciences socialis, l'Université de Poitiers, 2012, p179.

23Courd'appel Colmar,6éme chambre,N°10098/20,12 Mars 2020Courd'appel Colmar,6éme chambre,N°10098/20,12 Mars 2020, www.actanceavocats.com, Date of visit 22/9/2020, 12 PM

[24] The cassation court's decision no. 14/ General Authority/2020 in its session on the 25th/8/2020, available at: www.hjc.iq، visited on the 6th/10/2020 at 4:20 pm.

25The WHO report available at: www.skynewsarabia.com، visited on the 18th/5/2020 at 6:12 pm.

contained in man-made laws on the one hand. On the other hand, the description of force majeure cannot be applied to the Corona epidemic. Thus, it includes all contracts, as contracts differ in terms of their financial magnitude, their conditions and the positions of the parties, in addition to that mere delay in implementation allows the late party to adhere to the force majeure represented by the Corona virus.

Second: The Contingency theory

The principle is that the contract is the judiciary of the contractors, that is, the contracting parties are obligated to implement the contract according to what it contains[26]. However, this principle is excluded from the Iraqi legislation according to Article (146/2) of the amended Civil Law No. (40) for 2951, in cases in which accidents that could not be anticipated. As a result of its occurrence, the implementation of the contractual obligation, although not impossible, becomes so burdensome that threatens a heavy loss. After balancing the interests of the two parties, the court may reduce the obligation to a reasonable extent.

To apply the theory of contingent conditions, there are several conditions as follows:

1. The contract is one of the continuous implementation contracts. There is a period of time between the conclusion of the contract and its implementation, or the immediate implementation thereof and the implementation therein is postponed[27]. The Iraqi law did not explicitly stipulate the application of the theory of contingent circumstances. The contract is one of the continuous contracts, except that Article (2/146) applies only when the accident occurs in a period of time between the conclusion of the contract and the implementation of the obligation. If the obligation has been fulfilled, it lapses, and then the application of the theory of emergency conditions is prohibited because it responds to an existing commitment that has not yet been fulfilled[28].
2. They occur during the implementation of the contract. They are not limited to the indebted as death or bankruptcy.
3. It is not possible to Expect these exceptional circumstances and accidents upon concluding the contract.
4. In order to be considered an emergency, the accident must be unavoidable. If it is avoidable in a manner that is expected or unexpected, then the contractual commitment should be fulfilled. If it does not become impossible, it becomes exhausting For the indebted so that it threatens an understatement.

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[26] Article 146/1 of the Iraqi amended Civil Law no. 40 of 1951 stipulates that if the contract is implemented, no party can dissolve, amend, or change it except by law or by mutual acceptance.

[27] Rasheed, H. (2016-2017) The obligation theory: Sources of obligation, Lectures for students of faculty of Law, Ahlulbait university, p. 84.

[28] The cassation court's decision no. 495/ General authority 1978, Judiciary rulings collection, no. 2, p. 45, Al-Fadhl, M. (1991) General theory of obligations in the civil law: Sources of obligation, part 1, 1st edition, House of books and documents, Baghdad, p. 249, and the Cassation Court's decision no. 362/ emergency conditions/ 2007, available at: www.hjc.iq، visited on the 6th/6/2020 at: 5:57 pm.

5. It is a fatal problem. In this way, it differs from force majeure. They both share that each of them is an event that cannot be expected and cannot be avoided. They differ in terms of effect. Force majeure makes the commitment impossible and the indebted obligation ends. Emergency circumstances make the implementation of the obligation only burdensome and not impossible[29].

If these conditions are met, the court may lift the fatigue from the indebted by restoring the economic balance of the contract, either by reducing the commitment to a reasonable extent after the balance between the interests of the two parties, or by increasing the corresponding commitment to the burdensome commitment. The Iraqi legislator has stipulated in the amended Civil Law No. (40) for 1951, explicitly increases the corresponding obligation in applications of the theory of contingent circumstances. Article (878) stipulates that if the prices of raw materials and labor wages rise, the contractor has no right to rely on that to request an increase in the wages even if this rise reaches a limit that makes the implementation of the contract difficult, provided that if the economic balance between the obligations of the employer and the contractor collapses completely due to accidents that were not taken into account at the time of the contract. The court may order an increase in the wages....It is possible to restore the economic balance of the
contract, which in turn lifts the fatigue from the indebted. The judge may resort to stopping the implementation of the contract until the end of the emergency situation if the accident is of a temporary nature. Article 394/2 of the Iraqi civil law states that if the debt is not deferred, or its term has expired, it must be paid immediately. Despite that, the court may, when necessary, if it is not prevented by a text in the law, consider the indebted for a suitable term, if the condition requires so in case that the creditor has not suffered from serious harms.It is clear that restoring the economic balance to the contract through these solutions undoubtedly secures life for the contract in order not to be demolished as is the case with force majeure. So, Corona virus is a force majeure, as stated in the order. It is not considered an emergency circumstance. The Iraqi State Council approved in the Ministerial Order No. 751 on the 5th/3/2020, whose introduction includes that in view of emergency circumstances .... etc.), the judge may adapt to the situation according to the
circumstances of the contract. If the judge finds that the commitment has become impossible to implement, then the classification of the Corona pandemic becomes within the force majeure, which imposes itself on one of the parties to the contract and prevents the implementation of the obligation. If the judge finds that the commitment is not impossible to implement but is burdensome for the indebted, Then the theory of emergency conditions is applied. In times of epidemics and disasters, resorting to these theories is a solution to contractual disputes when their conditions are met.

CONCLUSIONS

Through the present study, the two researchers come up with results and recommendations as follows:

First: The results

[29] Al-Hakeem, A. previous source, p. 163.

The Corona pandemic has many effects on all legal relationships and contractual obligations. This epidemic has made fulfillment of contractual obligations cumbersome or impossible. Therefore, the Corona pandemic is a force majeure in the event that it is impossible to implement the commitment. In the event that the implementation is possible, but it is exhausting, the context is of an emergency situation.

Second: The recommendations

It is necessary to leave the legal conditioning of the Corona pandemic to the judge according to the facts presented before him, and the extent to which the provisions of both force majeure and emergency circumstances apply to the event.

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